LEONG KUM WHAY

v.

QBE INSURANCE (M) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[ORIGINATING MOTIONS NO: R1-25-114-1999]
21 JUNE 2004

ARBITRATION: *Award - Setting aside - Principles applicable - Whether there was an error of law on face of award - Whether arbitrator had misconducted himself - Arbitration Act 1952, s. 24(2)*

INSURANCE: *Life insurance - Construction of policy - Whether policies in question life policies or personal accident policies - Distinction thereof - Whether s. 15C(4) Insurance Act 1963 applicable - Insurance Act 1963, s. 15C(4)*

This was an application by the applicant to set aside the award of the learned arbitrator on the grounds that there was an error of law on the face of the award and/or that the learned arbitrator had misconducted himself within the meaning of s. 24(2) of the Arbitration Act 1952 ('the Act'). The applicant, who had been seriously injured in an accident resulting in him becoming totally blind in his right eye, made his claim against the respondent insurance companies under which, at the material time, he was insured. The respondents denied liability on the ground of misrepresentation and non-disclosure of material facts and, by agreement, the parties appointed the learned arbitrator to determine the disputes. The learned arbitrator found in favour of the first, second and third respondents but decided that the fourth respondent was to pay the applicant the sum of RM125,000 with interest thereon at 8% per annum from the date of the award. The applicant contended that the learned arbitrator had erred in law when he ruled that the claims against the first, second and third respondents could be avoided on the ground of misrepresentation and non-disclosure, which contravened s. 15C(4) of the Insurance Act 1963 ('the IA'). The applicant also submitted that the 8% interest per annum should commence from the date of the accident and not from the date of the award.

Held (dismissing the application):

[1] It was clear, from the record, that the applicant did not raise the issue of s. 15C(4) of the IA in his submission before the learned arbitrator; it was never pleaded in the pleadings. Thus, the learned arbitrator could not be said to have misconducted himself or committed an error of law when he did not decide on the said issue. It was not the duty of the learned arbitrator to make out a case for the applicant when the applicant did not raise or wish to raise the point. Similarly, it was not within the jurisdiction of this court to decide on an issue that had neither been raised nor decided upon before the learned arbitrator, bearing in mind that this was a judicial review. (p 197 c-d)

[2] In any event, s. 15C(4) of the IA relates to life policies whereas the policies issued by the first, second and third respondents were in respect of personal accident policies. Under the IA, there is a distinction between a "life policy" and a "personal accident policy"; thus, s. 15C(4) of the IA was not applicable in the instant case. The learned arbitrator had not made any mistake of law or fact in his award favouring the first, second and third respondents. (pp 197 e-h & 198 a-b)

[3] In respect of the applicant's complaint on the award of the learned arbitrator against the fourth respondent of interest at 8% per annum from the date of the award and not from the date of the accident, the power of the learned arbitrator to order payment of interest from the date of the award was a matter of discretion, and an exercise of such discretion could not be said to be a misconduct or an error of law. (p 198 c-d)

Case(s) referred to:
Leong Khum Whay & Anor v. American International Assurance Co Ltd [1995] 5 CLJ 11 HC ***(dist)***

Legislation referred to:
Arbitration Act 1952, ss. 23(1), 24(2)
Insurance Act 1963, ss. 5, 15C(4)

Other source(s) referred to:
Halsbury's Laws of England, 3rd edn, vol 22, para 484

For the applicant - Gobind Singh Deo; M/s Karpal Singh & Co
For the respondents - Khoo Eng Chin; M/s Khoo & Sidhu

Reported by Suresh Nathan

JUDGMENT

Raus Sharif J:

This is an application by the applicant to set aside the award of the learned arbitrator, Dato' Peh Swee Chin made on 14 September 1999 on the grounds that there is an error of law on the face of the award and/or that the learned arbitrator has misconducted himself within the meaning of s. 24(2) of the Arbitration Act 1952 ("the Act").

Briefly, the factual background that led to this application by the applicant are as follows.

The applicant was seriously injured in an accident on 28 June 1992, as a result of which he sustained total blindness of his right eye. At the material time he was insured by all the respondents as well as by Mercantile Insurance Sdn. Bhd. As the result from his injuries, the applicant made his claims against the said insurance companies. The insurance companies, however, denied liability solely on the ground of misrepresentation and/or material non disclosure. By agreement, the parties appointed the learned arbitrator to determine the disputes. However, the claim against the Mercantile Insurance Sdn. Bhd. was stayed pending the granting of leave by the High Court to continue proceeding against it, as it had at the material time been wound up and under liquidation. Thus, the learned arbitrator proceeded only to hear the dispute between the four respondents and the applicant.

The issues agreed by the parties for trial before the learned arbitrator can be briefly stated. In regard to the first and second respondents, the first issue was whether the respondents had waived the requirement of disclosure by renewing their policies without requiring the applicant to fill and submit a fresh proposal. The second issue was whether the said renewal has been obtained by misrepresentation and/or non disclosure of material facts. In regard to the third and fourth respondents the only issue which the parties called the learned arbitrator to determine was whether the renewal of their policies had been obtained by misrepresentation and/or non disclosure of material facts.

The learned arbitrator in his awards dealt with the claims against the respondents in respect of the agreed issues in sequence. In respect of the first respondent the learned arbitrator stated as follows:

The accident took place during the continuance of the renewed policy No. 01-1021975 for the period of 7.3.92 to 6.3.93; the original policy bearing the same number having expired on 6.3.92. When it was about to expire, the respondent gave notice to the claimant as to whether the latter required its renewal for another year, the claimant agreed to it by paying the relevant premium without the first respondent requiring a fresh proposal to be filed in and signed.

Before the original policy was issued, the claimant had to and did fill in a proposal which appear at page 1 of the respondents' bundle of documents, hereinafter referred to as 'BDB'. It will be relevant to refer to only question 4 of the proposed dated 7.3.91. The said question states: Are you at present insured against Life, Accident or Sickness? If yes, give details of name of company, amount of insurance (Capital sum and weekly benefit"). The answer given by the claimant states:

LIFE … AIA $100,000/- P/A … $200,000/-

The learned arbitrator then made a finding of fact that the applicant had disclosed only two of his existing policies and thus the answer by the applicant to the question as to the number of insurance policies he has was inaccurate or untrue. He further held the renewal of the policy constituted fresh contract and consequently on renewal, the duty of disclosure reattaches. To support his reasoning the learned arbitrator relies on a passage in *Halsbury's Laws of England*, 3rd edn, vol. 22 para 484 wherein he quotes the following:

484 Renewal of fresh contract, where the policy is renewable by mutual consent, each renewal constitutes a fresh contract. Consequently, on each renewal, the duty of disclosure reattaches, and the assured must disclose any facts which have become material during the preceding period of insurance. In practice, a fresh proposal is not used; but the original proposal is treated as if it was repeated on each renewal, and it is the duty of the assured to correct any statements which become inaccurate.

On the other hand, as on each renewal policy is not liable to be avoided by a misstatement which would have avoided the original insurance if it had in fact become correct before the renewal, and the policy may contain an express stipulation to this effect.

The learned arbitrator therefore, decided on the two issues as stated earlier in favour of the first respondent.

In respect of the second respondent the learned arbitrator dealt with the applicant's claim as follows:

> I now deal with the claims against the second respondent with regard to the second issue that are common to it to the first respondent. The factual situation here is similar to that in the case of the first respondent, only particulars differ such as policy numbers, etc. My reasoning and grounds given in the case of the first respondent would apply mutatis mutandis to the case of the second respondent.

Thus, the learned arbitrator therefore decided on both issues in favour of the second respondent.

In regard to the applicant's claim against the third respondent, the learned arbitrator, dealt with it as follows:

> What distinguish this claim from the others is that a fresh proposal was required of renewal of Policy No. PA718839 issued by the fourth respondent for a second year for the period of 15.3.1992 and 14.3.1993. Much of my reasoning given in respect of the first respondent will apply *mutatis mutandis* to the present claim and indeed to all the other claims.

(The 'fourth respondent' at the arbitration is the third respondent in this instant application).

The learned arbitrator after analysing the evidence, found that as a matter of fact the applicant did not disclose in the proposal form that he has at the material time two life policies and seven personal accident policies. The applicant only disclosed that he had two life policies and one personal accident policy. Therefore, the learned arbitrator, decided the sole issue in favour of the third respondent.

In regard to the fourth respondent, the learned arbitrator decided on the issue in favour of the applicant. The learned arbitrator therefore, made an award that the fourth respondent to pay the applicant the sum of RM125,000 with interest thereon at 8% per annum from the date of the award. The complaint by the applicant is in regard to the interest awarded. It is submitted by the applicant that the 8% interest per annum should be from the date of the accident which is on 26 June 1992 and not from the date of the award which is 17 September 1999.

This application by the applicant is made under s. 23(1) and s. 24(2) of the Act. Section 23(1) and 24(2) of the Act provides as follows:

23. Power to remit award.

(1) In all cases of reference to arbitration, the High Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire.

24. Removal of arbitrator and setting aside of award.

(2) Where an arbitrator or umpire has misconducted himself on the proceedings, or an arbitration or award has been improperly procured, the high Court may set the award aside.

However, as the learned arbitrator has since passed away, the applicant is only seeking from this court to set aside the award. It is settled law that for the applicant to succeed in this application, it must be shown that there is an error of law on the face of the award or that the learned arbitrator has misconducted himself.

It is submitted by the learned counsel for the applicant that the learned arbitrator had erred in law when he ruled that instances of non-disclosure were sufficient to floor the applicant's claim against the first and second respondents. It is submitted that both the original insurance policies in respect of the first and second respondents are covered by s. 15C(4) of the Insurance Act 1963. The case of *Leong Khum Whay & Anor. v. American International Assurance Co. Ltd.* [1999] 5 CLJ 11 was cited as an authority to support the proposition. According to learned counsel, the policies, were 'life policies' within the meaning of s. 5 of the Insurance Act. Thus under s. 15C(4) of the Insurance Act 1963, no life policy affected after the commencement of the section shall, after the expiry of two years from the date on which it was affected be called into question by an insurer on the ground that a statement made in the proposal for insurance was inaccurate or false unless the insurance shows that such a statement was in a material matter or supposed a material fact and that it was fraudulently made by the policy holder with the knowledge that the statement was false or that it suppresses a material fact.

It is further submitted that the law, by virtue of s. 15C(4) works to protect the cut and dry defence of misrepresentation and non-disclosure, to evade liability. In the circumstances, it is submitted by the learned counsel for the applicant that the learned arbitrator has erred in law in concluding that the claims against the first and second respondent could be avoided on the ground of misrepresentation and non-disclosure. According to the learned counsel, the position is also the same in respect of the third respondent. The provision of s. 15C(4) applies in that the applicant ought not to have his claim dismissed on the ground of misrepresentation and non-disclosure.

The learned counsel for the respondents in reply submitted that the learned arbitrator's findings in relation to non-disclosure of the policies by the applicant are findings of facts. In regard to the submission of counsel for the applicant on s. 15C(4) of the Insurance Act 1963, he responded by stating, firstly, the issue was not pleaded or raised in the submission before the learned arbitrator. Secondly, the case of *Leong Kum Whay*, has no application, as the policies in that case were life policies, while the policies in the instant case were personal accident policies.

I am in agreement with the submission of the learned counsel for the respondents. It is clear from the record the applicant did not raise the issue of s. 15C(4) of the Insurance Act 1963 in his submission before the learned arbitrator. It was never pleaded in the pleadings. Thus, the learned arbitrator cannot be said to have had misconducted himself or committed an error of law when he did not decide on the said issue. It is not the duty of the learned arbitrator to make out a case for the applicant when the applicant did not raise or wish to raise the point. Similarly, it is not within the jurisdiction of this court to decide on an issue which was not raised and decided upon before the learned arbitrator bearing in mind that this is a judicial review.

In any event, s. 15C(4) of the Insurance Act 1963 relate to life policies. This can be seen from the opening words of the section which state that "no life policy …". But the policies issued by the first, second and third respondents respectively were in respect of personal accident policy. Under the Insurance Act 1963 there is a distinction between "life policy" and "personal accident policy". Section 5 of the First Schedule of the Insurance Act 1963 defines life policy as:

> 5. "Life policy" means any policy by which payment of policy moneys is insured on death (otherwise than by way of insurance against personal accident, disease or sickness only) or on the happening of any contingency dependent on the termination or continuance of human life, and includes a policy which is subject to payment of premiums for a term dependent on the termination or continuance of human life and a policy securing the grant of an annuity for such a term.

While s. 9 of the same schedule define 'personal accident policy' as:

> 9. "Personal accident policy" means a policy of insurance upon the happening of personal accidents, whether fatal or not, disease or sickness, or any class of personal accidents, disease or sickness.

In the instant case the policies taken by the applicant relates to the personal accident policies Thus, s. 15C(4) of the Insurance Act 1963 is not applicable. In *Leong Kum Whay*, s. 15C(4) was held to be applicable because the impugned policies revealed the coverage was not in respect of personal accident but fell under the definition of life policy.

Thus, it is my finding that the learned arbitrator has not made any mistake of law or fact in his award favouring the first, second and third respondents. There is also no basis to conclude that the learned arbitrator, has misconducted himself.

With regards to the complaint by the applicant on the award of the learned arbitrator against the fourth respondent in regard to the interest at 8% per annum from the date of the award and not from the date of the accident, I am of the view that the power of the learned arbitrator to order payment of interest from the date of the award is a matter of discretion. It cannot be said in exercising the discretion the learned arbitrator has committed an error of law or misconducted himself.

In conclusion, it is my finding that there is no error of law on the face of the learned arbitrator's award and that the learned arbitrator has not misconducted himself within the meaning of s. 24 of the Act.